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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION
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15 JIMETTA YVONEE RILEY,) CV 08-8010-SH
16)
17 Plaintiff,) MEMORANDUM DECISION
18)
19 v.)
20 MICHAEL ASTRUE, Commissioner,)
21 Social Security Administration,)
22 Defendant.)
23

24 **I. PROCEEDINGS**

25 Plaintiff Jimetta Yvonne Riley filed a Complaint on December 8, 2008
26 seeking review of the Decision of the Commissioner of the Social Security
27 Administration denying Disability Insurance Benefits (DIB) and Supplemental
28 Security Income (SSI). The parties consented to proceed before the United States
Magistrate Judge. Plaintiff submitted a supplemental certified administrative

1 record on May 19, 2009, which included several pages of medical records that
2 were allegedly omitted from the administrative record supplied to the Appeals
3 Council. Plaintiff submitted a request to augment the record on July 13, 2009,
4 however the supplementary pages provided by the plaintiff were already
5 contained in the supplemental certified administrative record (see Administrative
6 Record [AR] 242-44). Plaintiff filed a brief in support of the Complaint on July
7 13, 2009 and moved for summary judgment. Defendant filed an opposition
8 brief on August 12, 2009, including a cross-motion for summary judgment.
9 Plaintiff filed a reply on August 20, 2009.

10 11 **II. BACKGROUND**

12 On August 28, 2006, plaintiff filed an application for DIB and SSI
13 alleging an inability to work commencing March 1, 2003.¹ The Social Security
14 Administration denied plaintiff's original application initially and upon
15 reconsideration. Plaintiff requested a hearing before an Administrative Law
16 Judge (ALJ), which occurred on October 15, 2007.

17 In a written opinion issued on November 30, 2007, the ALJ found that
18 plaintiff suffered several severe impairments, including obesity, status post
19 multiple surgeries to the cervical spine, arthritis, and asthma, AR 21, but that
20 these impairments taken together did not equal one of the listed impairments in
21 20 C.F.R. Part 404, Subpart P, Appendix 1. The ALJ found that plaintiff retained
22 a residual functional capacity (RFC) permitting light work with an additional
23 nonexertional limitation due to asthma. (AR 22).

24 In articulating plaintiff's RFC, the ALJ addressed plaintiff's subjective
25 claims of severe pain in her lower back, knees, left shoulder, and hands, which
26 she alleged caused her constant pain, required her to constantly alternate between
27 sitting and standing positions, and prevented her from typing for more than 20

28 ¹ Plaintiff filed a prior claim for DIB on August 10, 1989, which was denied. (AR 89).

1 minutes at a time, AR 29-35. The ALJ found that plaintiff's medically
2 determinable impairments could reasonably be expected to produce her alleged
3 pain symptoms, but that her testimony concerning the intensity, persistence, and
4 limiting effects of her pain symptoms was not entirely credible. (AR 22). The
5 ALJ concluded that plaintiff retained the ability to perform past relevant work as
6 a medical biller, administrative assistant, assembler, or contractor. Plaintiff filed
7 a request for Appeals Council review on January 18, 2008, submitting additional
8 medical records for Appeals Council consideration, which were added to the
9 Administrative Record. The Appeals Council declined review on October 6,
10 2008.

11 Plaintiff asserts that the ALJ failed to provide clear and convincing
12 reasons for discounting her excess pain testimony, and that the ALJ did not
13 properly articulate plaintiff's RFC. For the reasons discussed below, this Court
14 finds that plaintiff's claims have merit and remands for further proceedings.

15 16 **III. STANDARD OF REVIEW**

17 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to
18 determine if: (1) the ALJ's findings are supported by substantial evidence; and
19 (2) the ALJ used proper legal standards. Delorme v. Sullivan, 924 F.2d 841, 846
20 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla,"
21 Richardson v. Perales, 402 U.S. 389, 401 (1971), but "less than a
22 preponderance," Desroisiers v. Secretary of Health and Human Servs., 846 F.2d
23 573, 576 (9th Cir. 1988). This court cannot disturb the Commissioner's findings
24 if they are supported by substantial evidence, even though other evidence may
25 exist which supports plaintiff's claim. See Torske v. Richardson, 484 F.2d 59, 60
26 (9th Cir. 1973), cert. denied, Torske v. Weinberger, 417 U.S. 933 (1974); Harvey
27 v. Richardson, 451 F.2d 589, 590 (9th Cir. 1971).

1 It is the duty of this court to review the record as a whole and to consider
2 adverse as well as supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30
3 (9th Cir. 1986). The court is required to uphold the decision of the ALJ where
4 evidence is susceptible to more than one rational interpretation. Gallant v.
5 Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984). The court has the authority to
6 affirm, modify, or reverse the ALJ's decision "with or without remanding the
7 cause for rehearing." 42 U.S.C. § 405(g). Remand is appropriate where
8 additional proceedings would remedy defects in the ALJ's decision. McAllister
9 v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989).

10 11 IV. DISCUSSION

12 An ALJ is not required to accept every allegation of disabling pain, or else
13 disability benefits would be available for the asking. Fair v. Bowen, 885 F.2d
14 597, 603 (9th Cir. 1989). However, in the absence of evidence that a plaintiff is
15 malingering, the ALJ must provide clear and convincing reasons to support an
16 adverse credibility determination. Valentine v. Comm'r, 574 F.3d 685, 693 (9th
17 Cir. 2009); Johnson v. Shalala, 60 F.3d 1428, 1433 (9th Cir. 1995).

18 To determine whether plaintiff's testimony regarding severity of
19 symptoms is credible, the ALJ may consider, among other things, the following
20 evidence: (1) ordinary techniques of credibility evaluation, such as claimant's
21 reputation for lying, prior inconsistent statements concerning symptoms, and
22 other testimony by the claimant that appears less than candid; (2) unexplained or
23 inadequately explained failure to seek treatment or to follow a prescribed course
24 of treatment; and (3) the claimant's daily activities. Smolen v. Chater, 80 F.3d
25 1273, 1284 (9th Cir. 1996).

26 To constitute a basis for finding allegations of disabling pain not credible,
27 the claimant's daily activities must be rigorous enough to be a fair proxy for the
28 demands of work. See Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989). While

1 the ALJ may reject a plaintiff's symptom testimony if plaintiff is able to spend a
2 substantial part of her day performing household chores or other activities
3 transferable to a work environment, the claimant need not be utterly
4 incapacitated to be eligible for benefits. Smolen, supra; Gallant, supra (ordering
5 award of benefits for constant back and leg pain despite claimant's ability to
6 cook meals and wash dishes).

7 Although lack of medical evidence cannot form the sole basis for
8 discounting pain testimony, it is a factor that the ALJ can consider in credibility
9 analysis. Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005). However, once
10 plaintiff offers evidence of a medical impairment that could reasonably be
11 expected to produce pain, the ALJ may not discredit a claimant's testimony of
12 pain and deny disability benefits solely because the degree of pain alleged by the
13 claimant is not supported by objective medical findings. Bunnell v. Sullivan, 947
14 F.2d 341, 346-47 (9th Cir. 1991) (emphasis added). The effectiveness of pain
15 medication, including adverse side-effects, is a factor the ALJ may consider in
16 evaluating allegations of disabling pain. Id. Conservative or infrequent treatment
17 may be used by the ALJ to refute allegations of disabling pain. Johnson v.
18 Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995). However, a plaintiff's failure to
19 seek adequate treatment is an acceptable reason to discount pain testimony only
20 if it is unexplained or inadequately explained. SSR 96-7p. Social Security Ruling
21 96-7p provides that, "an adjudicator must not draw any inferences about an
22 individual's symptoms and their functional effects from a failure to seek or
23 pursue regular medical treatment without first considering any explanations that
24 the individual may provide, or other information in the case record, that may
25 explain infrequent or irregular medical visits or failure to seek medical treatment.
26 The adjudicator may need to recontact the individual or question the individual at
27 the administrative proceeding in order to determine whether there are good
28 reasons the individual does not seek medical treatment or does not pursue

1 treatment in a consistent manner.” *Id.* The inability to afford treatment is a valid
2 explanation for not obtaining it. *Regennitter v. Comm’r*, 166 F.3d 1294, 1297
3 (9th Cir. 1999).

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5 **A. THE ALJ FAILED TO PROVIDE CLEAR AND CONVINCING**
6 **REASONS FOR DISCOUNTING PLAINTIFF’S EXCESS PAIN**
7 **TESTIMONY**

8 Since the record presents no indications of malingering by plaintiff, the
9 ALJ was required to provide clear and convincing reasons for finding plaintiff’s
10 pain testimony not entirely credible. The ALJ failed to provide clear and
11 convincing reasons and therefore committed error.

12
13 Plaintiff’s Daily Activities

14 The ALJ reasoned that the degree of pain plaintiff alleged was inconsistent
15 with her ability to perform certain daily activities, including preparing meals,
16 doing simple household tasks, and walking up to three blocks despite using a
17 cane. (AR 22). The ALJ also asserted that plaintiff gave contradictory statements
18 regarding how much weight she could lift. *Id.* To support these conclusions, the
19 ALJ cited plaintiff’s testimony at the administrative hearing and her written
20 responses on an Exertional Daily Activities Questionnaire (“the questionnaire”)
21 completed prior to the hearing. (AR 22, 28-35, 104-06).

22 The ALJ presented this evidence perfunctorily, selectively, and out of
23 context. The ALJ stated that plaintiff can “prepare meals.” However, in response
24 to a direct question posed by the ALJ concerning plaintiff’s ability to cook and
25 do household chores, plaintiff testified that, “before my husband goes to work he
26 fixes me something to eat and fix [sic] whatever I need until he gets home.” (AR
27 30). Plaintiff then testified how pain symptoms in her legs and back, which
28 require her to constantly alternate between standing and sitting positions, make it

1 difficult for her to cook, before concluding, “. . . not really. It’s very difficult.”
2 In response to a question about what activities plaintiff engages in on an average
3 day, plaintiff wrote, “All I can do is get me something to eat because I can’t
4 stand long or will fall if stand to [sic] long.” (AR 104). Here, plaintiff admitted
5 retrieving and eating food, not “preparing” meals. Even construing plaintiff’s
6 testimony to mean she can occasionally cook for short periods despite pain, the
7 record does not clearly support a finding that this limited functional ability is
8 transferable to a work environment.

9 Nor does the record support the ALJ’s assertion that plaintiff can perform
10 simple household tasks. When asked what she was able to do in a regular day,
11 plaintiff testified, “Not much, your Honor.” (AR 29). When asked whether she
12 was able to do any cooking or cleaning around the house, plaintiff responded by
13 discussing how her husband prepares meals but did not mention any household
14 tasks. (AR 30). The only other household activities plaintiff discussed were
15 watching TV, listening to the radio, and occasionally driving, and plaintiff
16 testified that her symptoms make even these sedentary tasks difficult. *Id.* In the
17 questionnaire, plaintiff expressly denied being able to do cleaning chores, stating
18 in one answer, “I can’t hardly walk, I can’t even clean the house because of the
19 pain.” (AR 104). In response to a question about plaintiff’s ability to do
20 household cleaning, plaintiff wrote, “Can’t do anything because of pain and if I
21 don’t take medicine I can’t move or do anything.” (AR 105). Based on the
22 evidence cited by the ALJ, it is difficult to identify which household tasks
23 plaintiff is capable of performing.

24 The ALJ claimed that plaintiff’s statements are in conflict because she can
25 walk up to three blocks despite using a cane, experiencing shortness of breath
26 from asthma, and suffering leg and shoulder pain. (AR 22). However, the ALJ’s
27 characterization omits crucial detail from plaintiff’s questionnaire response, in
28 which she wrote, “I use a cane and walk to store [sic]. It takes me at least 1 hour

1 to walk 3 blocks to the store, and I have to get a ride back because of pain after
2 walking. I can't do anything but rest, can't cook, stand etc. Must rest for at least
3 2 hrs." (AR 104). The ALJ selectively considered this statement as evidence of
4 plaintiff's "stamina." In context, plaintiff's account of her limited ability to walk
5 is consistent with her account of disabling pain and therefore does not clearly
6 support the ALJ's adverse credibility determination. Considered together, these
7 daily activities are not sufficiently rigorous or substantial to be a fair proxy for
8 the demands of an average work day.

9 The ALJ also asserted that plaintiff gave inconsistent statements regarding
10 her lifting capacity. Plaintiff testified that she could lift up to fifteen pounds,
11 although she previously wrote on the questionnaire that she could lift no more
12 than five pounds. (AR 30, 105). However, considering these statements in
13 context indicates that the ALJ selectively presented this evidence. At the hearing
14 the ALJ asked plaintiff how much she could pick up and carry, to which she
15 answered, "Maybe about 10, 15 pounds. Very little." (AR 30). On the
16 questionnaire, plaintiff wrote that she can lift, "Nothing over 5 lbs or it hurts to
17 [sic] bad - in back lower [sic]." (AR 105). Contrary to the ALJ's contention,
18 these two statements are not inconsistent. Plaintiff's questionnaire response
19 indicates that lifting more than five pounds triggers pain in her lower back, not
20 that she is physically incapable of lifting more than five pounds. At the hearing,
21 the ALJ asked plaintiff how much she could lift, not how much she could lift
22 without pain. Further, a discrepancy of five to ten pounds is insufficient to
23 conclude that plaintiffs' two statements were materially inconsistent, given that
24 both were delivered in rough, approximate terms accompanied by qualifiers.

25 The evidence cited by the ALJ regarding plaintiff's daily activities, when
26 considered in context, does not materially conflict with plaintiff's excess pain
27 testimony. Therefore, with respect to this evidence, the ALJ did not provide clear
28 and convincing reasons supporting an adverse credibility determination.

1 Medical Record

2 The ALJ found that the medical record did not entirely support plaintiff's
3 complaints of severe arthritic pain, restricted back and joint functions, or severe
4 asthma. The ALJ observed that: most of plaintiff's visits to the medical clinic, El
5 Proyecto del Barrio ("the clinic"), have been for medication refills; plaintiff's
6 asthma was easily controlled with medication, with only occasional reports of
7 shortness of breath; and no radiographs (x-rays) were provided to show joint
8 degeneration. (AR 22). In reaching these factual conclusions, the ALJ
9 overlooked or failed to credit substantial medical evidence.

10
11 1. Evidence of Joint Degeneration

12 The ALJ initially acknowledged that plaintiff underwent multiple spinal
13 surgeries in the past, AR 21, a fact that is not mentioned in the ALJ's credibility
14 analysis, AR 22-23. The ALJ credited the medical opinion of consultative
15 examiner Dr. Lim, which included medical findings supporting plaintiff's pain
16 testimony.² Specifically, the ALJ summarized portions of Dr. Lim's evaluation,
17 noting that, "[c]omplaints of back pain were supported by paravertebral
18 tenderness and decreased ranges of flexion, but there were no signs of
19 radiculopathy. Range of motion of the left shoulder, ankles, and left knee were
20 painful and right knee motions were mildly decreased. . . . Gait was slow and
21 painful" (AR 23). Although Dr. Lim opined that plaintiff was physically
22 capable of performing light work, AR 189, the substance of Dr. Lim's evaluation
23 does not clearly contradict plaintiff's pain testimony.

24 Further, the ALJ erroneously concluded that plaintiff provided no x-ray
25 evidence of joint degeneration. The ALJ stated, "There are no x-rays in the file to
26 show degenerative changes in the joints or in the cervical and lumbar spines."

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28 ² The ALJ also rejected the medical opinion of Dr. Morguars, one of plaintiff's treating physicians. (AR 23).
However, on appeal plaintiff does not object to this part of the ALJ's Decision.

1 (AR 21). Yet the record contains a medical report regarding an x-ray taken of
2 plaintiff's lumbar spine, ordered by Dr. Lim and dated December 13, 2006. (AR
3 190). This report indicates that plaintiff's lumbar spine showed "marked disc
4 space narrowing at L5-S1. There are small osteophytes present. The apophyseal
5 joints are narrowed and sclerotic." The report concluded that plaintiff suffered
6 "[m]oderate degenerative disease at L5-S1." Id. The ALJ simply overlooked this
7 x-ray report. In addition, subsequent to the ALJ hearing, plaintiff supplemented
8 the record with an x-ray of her right knee, which showed mild to moderate
9 osteoarthritis. (AR 243).

10 With respect to evidence of joint degeneration, the medical evidence is not
11 incongruous with plaintiff's pain testimony. Since the ALJ may not discount
12 plaintiff's credibility merely on the basis that the medical evidence does not
13 support the degree of pain alleged by plaintiff, Bunnel, supra, this evidence does
14 not provide clear and convincing reasons to discount plaintiff's pain testimony.

15 16 2. Conservative Treatment

17 The ALJ made several factual observations that were presumably intended
18 to support a finding that plaintiff received only conservative, infrequent medical
19 care. The ALJ's reasoning, while not groundless, is insufficient to find plaintiff's
20 pain testimony not credible under a 'clear and convincing' standard.

21 While most of plaintiff's visits to the clinic included requests to refill
22 plaintiff's asthma and pain medications, plaintiff also sought evaluation and
23 treatment for her claimed medical conditions. (See AR 169, 170, 174, 176, 201,
24 202, 221). Even assuming that failure to seek medical treatment constituted valid
25 support for the ALJ's adverse credibility determination, the ALJ erred by failing
26 to question plaintiff about this issue during or after the hearing, denying plaintiff
27 the opportunity to provide an explanation for any purported inadequacy in her
28 course of medical treatment. See SSR 96-7p. The ALJ was aware that plaintiff

1 received medical care from a free clinic, AR 33, raising the possibility that
2 plaintiff was unable to afford further treatment, but the ALJ did not address this
3 fact as a possible explanation for plaintiff's purportedly inadequate pursuit of
4 medical care. See id. (providing that the ALJ may not draw any inferences from
5 a plaintiff's failure to pursue adequate medical treatment for pain, "without first
6 considering any explanations that the individual may provide, or other
7 information in the case record."); Regennitter, *supra*.

8 While the ALJ properly noted that pain medications relieved plaintiff's
9 symptoms somewhat, the ALJ did not consider adverse side effects, even though
10 plaintiff indicated that she experienced disorientation and drowsiness. (See AR
11 104, 106, 111). The fact that no doctor has recommended knee surgery or
12 physical therapy provides some support for the ALJ's adverse credibility
13 determination. However, the subsequently submitted x-ray of plaintiff's right
14 knee demonstrates mild to moderate osteoarthritis, which supports plaintiff's
15 credibility. (AR 243). The ALJ asserted that plaintiff's asthma was easily
16 managed by medication and that there were only occasional reports of shortness
17 of breath, AR 22, but did not mention that plaintiff has required emergency room
18 treatment for her asthma symptoms. (See AR 170, 176).

19 In light of the record as a whole, and given material errors in the ALJ's
20 analysis discussed above, this Court concludes that the ALJ's adverse credibility
21 finding was not supported by clear and convincing reasons.

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26 **B. THE ALJ'S ERRONEOUS CREDIBILITY FINDING**
27 **PRECLUDES REVIEW OF THE ALJ'S DISABILITY**
28 **DETERMINATION**

1 In concluding that plaintiff retained the RFC to return to past relevant
2 work, the ALJ relied on the testimony of vocational expert (“VE”) Dr. June
3 Hagen, AR 23, 35-38. The ALJ posed two hypotheticals to the VE, both of
4 which related to plaintiff’s ability to perform past relevant work. (AR 36-37). In
5 the first hypothetical, the ALJ asked the VE to assume that plaintiff could
6 perform light work and was limited to frequent balancing, stooping, kneeling,
7 crouching, and crawling, with occasional climbing, and an additional
8 environmental limitation. The VE testified that, plaintiff could perform all past
9 relevant work, except for one position. The second hypothetical included an
10 additional limitation to only occasional use of handling and fingering. The VE
11 testified that under this further limitation, plaintiff could not perform any past
12 relevant work. Plaintiff’s attorney then posed his own hypothetical, which
13 included plaintiff’s pain-related symptoms. (AR 37-38). The VE testified that
14 plaintiff could not perform any past relevant work, given these symptoms.

15 Since the VE’s testimony, upon which the ALJ relied, indicates that
16 plaintiff’s pain-related symptoms could have precluded her from performing past
17 relevant work, the ALJ’s improper credibility determination was material error.
18 Since a proper articulation of plaintiff’s RFC is necessary to determine whether
19 plaintiff can perform past relevant work and, if necessary, whether plaintiff can
20 perform other jobs available in the national economy, this court is unable to
21 determine whether plaintiff is disabled within the meaning of the Social Security
22 Act. Remand is therefore warranted.

23 On appeal, plaintiff argues that the ALJ, in articulating plaintiff’s RFC,
24 also failed to include limitations in plaintiff’s ability to perform tasks requiring
25 pushing, pulling, and/or fingering. While these claimed limitations may be
26 considered in reassessing plaintiff’s RFC on remand, this Court neither accepts
27 nor rejects plaintiff’s contentions on this point.
28

1 **CONCLUSION AND ORDER**

2 For the foregoing reasons, the decision of the Commissioner is reversed
3 and remanded pursuant to Sentence 4 of 42 U.S.C. Section 405(g) for further
4 proceedings in accordance with this decision.

5 DATED: April 9, 2010

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9 STEPHEN J. HILLMAN
10 UNITED STATES MAGISTRATE JUDGE